UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/572,688	03/21/2006	Carlos Galceran Martorell	3608	4928

7590 10/27/2010

Striker Striker & Stenby
103 East Neck road
Huntington, NY 11743

EXAMINER	
MEHTA, HONG T	
ART UNIT	PAPER NUMBER
1789	
MAIL DATE	DELIVERY MODE
10/27/2010	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

Commissioner for Patents
United States Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450
www.uspto.gov

BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Application Number: 10/572,688
Filing Date: March 21, 2006
Appellant(s): MARTORELL, CARLOS

Michael Striker
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed September 13, 2010 appealing from the Office action mailed April 29, 2010.

(1) Real Party in Interest

The examiner has no comment on the statement, or lack of statement, identifying by name the real party in interest in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The following is a list of claims that are rejected and pending in the application:

Claims 5-16.

(4) Status of Amendments After Final

The examiner has no comment on the appellant's statement of the status of amendments after final rejection contained in the brief.

(5) Summary of Claimed Subject Matter

The examiner has no comment on the summary of claimed subject matter contained in the brief.

(6) Grounds of Rejection to be Reviewed on Appeal

The examiner has no comment on the appellant's statement of the grounds of rejection to be reviewed on appeal. Every ground of rejection set forth in the Office action from which the appeal is taken (as modified by any advisory actions) is being maintained by the examiner except for the grounds of rejection (if any) listed under the

subheading "WITHDRAWN REJECTIONS." New grounds of rejection (if any) are provided under the subheading "NEW GROUNDS OF REJECTION."

(7) Claims Appendix

The examiner has no comment on the copy of the appealed claims contained in the Appendix to the appellant's brief.

(8) Evidence Relied Upon

4,767,635	**MERRITT et al**	**8-1998**
EP 0217368	**EVANS**	**04-1997**

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claim 5-16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Evans (EP 0,217,368) further in view of Merritt et al. (US 4,767,635).

Regarding claim 5, 6, 7, 15 and 16, Evans discloses a method of flavoring unpopped corn kernels (Abstract) comprising the steps of soaking the kernels in an aqueous solution containing water and sodium chloride at a temperature of about 100°F to 170°F for 60 minutes to 24 hours (pg. 4, lines 6-9; 14-16; Example 1). Evans discloses a brining system with 16-32 g of flavoring including sodium chloride in 100 ml of water (col. 4, lines 1-4) which corresponds to 0.016 kg - 0.032 kg in 0.1 Liter of water or 14.4 kg to 28.8 kg in 90 Liters of water. As defined within specification page 1, lines 30-33; pg. 2, line 1 and pg. 3, lines 5-12, Evans' brine is considered hypersaturated brine with similar ingredients sodium chloride and water and disclosed amounts in the brining system.

Evans discloses sufficiently soaking the kernels in the brine to allow the flavoring to impregnate the corn kernel (pg. 1, lines 27-31). The soaking step is considered a

swelling step for corn kernels to soak and absorb the flavoring brine. Evans discloses drying the corn kernels in a forced draft oven, hot air for 60 minutes (pg. 5, lines 29-33; Example 1). In addition, Evans discloses the additional food flavoring in the "swelling" step, by adding to the soaking water ingredients such as garlic salt, onion salt, celery salt or butter flavored salt (pg. 4, lines 25-31) (see instant claim 15 for adding the additional flavoring during the swelling step). It would have been obvious to one of ordinary skill in the art to vary the combinations of additional flavoring salts to achieve a desired flavored corn kernel final product.

Evans does not disclose a surface coating with fixing agents or incorporating additional food flavoring within the step of drying the corn kernels (instant claim 5).

However, Merritt et al. discloses a method of preparing a free-flowing uniformed flavorant coated unpopped corn (Abstract). Merritt et al. discloses a spray coating of “fixing agents” such as edible adhesives and other flavors used to coat the unpopped corn (col. 4, lines 43-48; col. 11, lines 31-35; col. 2, lines 22-28). Examiner considers unpopped corn to be raw corn kernels. Merritt's coating step in combination during the Evan's drying step since Merritt teaches spray coating on unpopped corn kernels for added flavor.

It would have been obvious to one of ordinary skill in the art to use Merritt's process of surface coating with an edible adhesive and flavors in Evan's process of flavoring corn kernels. Merritt et al. disclose a step of coating the edible adhesive in order to prevent flavor loss in the flavored corn kernels final product. It would have been obvious to use Merritt’s aqueous coating mixture with edible adhesives and

flavorings in Evan's flavoring process to ensure an overall quality of flavor of the flavored corn foodstuff upon consumption.

With respect to claim 6, it would have been obvious that the flavoring would still take place at room temperature but may have diminished effects since the art clearly recognizes that elevating the temperatures would increase the flavoring but it does not appear to be necessary in order for the flavoring to take place. Furthermore, 100 degrees is relatively close to room temperature which is dependent upon location and time of day.

Regarding claim 8, it is conventional to create a homogenous mixture of brine solution comprising water and sodium chloride before the addition of foodstuff, such as corn kernels. It is well known in the art to evenly dissolve and distribute the ingredients into aqueous solution for even treatment of brining of the foodstuff.

Regarding claims 9, 10 and 11, Merritt et al. in view of Evan disclose the presently claimed invention as mentioned above in claim 5. Examiner considers a the range of 100°F to 170°F (pg. 4, lines 6-9; 14-16; Example 1) in brining/soaking of corn kernels substantially higher than room temperature. The surface area of corn kernels are exposed to atmospheric pressure at any process steps of the flavoring corn kernels. The limitations of claim 9 and 11 of "under pressure" do not specify any pressure therefore atmospheric pressure is considered to be "under pressure".

Regarding claim 12 and 14, Merritt et al. discloses surface coating with edible adhesive comprising shellac which is a resin (col. 11, line 31), gelatin or pectin (col. 3,

line 10) or the combination thereof, which does not impart food flavor such as in sweetness or saltiness.

Regarding claim 13, Merritt et al. discloses a surface coating with edible adhesive comprising mannitol or zein or the combination thereof, which does impact food flavor sweetness (col. 3, line 13).

(10) Response to Argument

Appellant's arguments filed September 13, 2010 have been fully considered but they are not persuasive.

Appellant argues that the prior art references do not disclose hypersaturated brine as cited in the claims. Evans discloses aqueous solution containing water and sodium chloride which is considered hypersaturated brine for corn kernels. Evans discloses a brining system with 16-32 g of flavoring including sodium chloride in 100 ml of water (col. 4, lines 1-4) which corresponds to 0.016 kg - 0.032 kg in 0.1 Liter of water or 14.4 kg to 28.8 kg in 90 Liters of water. As hypersaturated brine is defined within the specification page 1, lines 30-33; pg. 2, line 1 and pg. 3, lines 5-12, Evans' oversaturated/supersaturated brine is considered hypersaturated brine with the similar ingredients of sodium chloride and water and the disclosed amounts in the brine system.

Appellant argues that Evans teaches flavoring component in the brine produces a corn kernel impregnated inside and outside and in contrast the present invention has impregnation only inside the kernel. There is no clear support within the instant specification that treatment is only to the inside of kernel. It is unclear how applicant's

soaking would result in flavoring solely the interior of the kernel. Additionally, the claims do not preclude flavoring from being both interior and exterior to the kernel. In any case, Evans teaches rinsing with water to remove any remaining flavoring solution on the outside of the kernels (‘368, pg. 4, lines 30-31) which is considered to then have flavoring solution on the inside of the kernel only. The steps of soaking and rinsing in Evans is commensurate with that of applicant’s soaking step and what appears to permit flavorant to be present only on the interior of the kernel.

Appellant argues Merritt deals exclusively with a surface coating and does not include impregnation of corn kernels. Merritt is relied on for teaching a surface coating on unpopped corn kernels ('635, Abstract). Evans is relied upon for the teaching of a method of flavoring corn kernels in their unpopped state (‘368, pg. 25, lines 15-21) and Merritt et al. discloses a surface coating on unpopped corn (‘635, Abstract). The combined teachings of Merritt et al. and Evans disclose the claimed invention as discussed above with the coating of Merritt formed subsequent to the flavoring treatment of Evans. Evans provides a flavorant to the kernel which is imparted by a soaking process, while Merritt provides an adhesive coating to preserve the flavorant of the kernel. It would have been obvious to apply the coating of Merritt to the treated kernel of Evans to preserve the flavoring thereof.

While Merritt teaches that flavorant may be added to the kernel coating, it would have been obvious to use only the resin material if no further flavoring was desirable in the kernel, since the resin material serves to protect the flavoring already present in the kernel. In response to appellant's arguments against the references individually, one

cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.,* 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/HONG MEHTA/
Examiner, Art Unit 1789

Conferees:

/Jennifer C McNeil/
Supervisory Patent Examiner, Art Unit 1784

/Keith D. Hendricks/
Supervisory Patent Examiner, Art Unit 1781